MUHAMAD FADZLI RAMLI

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CRIMINAL APPEAL NO: B-05-35-1995]
23 JULY 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(c) - Doing an act for the purpose of trafficking in cannabis - Proof - Overwhelming evidence to support charge - Issues of whether adequate weight of drug was tested and whether drug was Indian Hemp or cannabis - Whether irrelevant and inconsequential - Dangerous Drugs Act 1952, ss. 2, 37(da), 39(B)(1)(c), 39(B)(2), Part III of First Schedule - Courts of Judicature Act 1964, s. 60*

The appellant was convicted of an offence of doing an act for the purpose of trafficking in 99.6g of cannabis under s. 39B(1)(c) of the Dangerous Drugs Act 1952 ('DDA') and was sentenced to death. Principally, the conviction was based upon the evidence that the appellant, pursuant to an earlier negotiation to sell the dangerous drug to agent provocateurs SP4 and SP5, had, on the day in question, carried along the drug in a yellow plastic bag for the purpose of handing it over to SP4 and SP5. In this appeal against his conviction and sentence, the appellant argued, firstly, that the chemist, in taking only about 1g of the plant material for the test, had taken insufficient samples of the drug for analysis; secondly, that the testimony of the chemist did not prove beyond a reasonable doubt that the bulk of the dried rolls was cannabis within the meaning of s. 2 of the DDA; and thirdly, that the learned judge's failure to re-evaluate the evidence upon the appellant choosing to remain silent when called upon to enter his defence was fatal, considering that this case had preceded *Arulpragasan Sandaraju v. PP* and was hence bound by the rule in *Khoo Hi Chiang & Anor v. PP and Another Case.* The main issue that arose was whether the objections as put forth by the appellant had merit, in view of the fact that the prosecution had not relied on s. 37(da) of DDA to prove its case, and further that, the learned judge, when calling for the defence, had satisfied himself that the evidence adduced, if unrebutted, would have warranted a conviction.

Held:
Per Arifin Zakaria JCA

[1] The evidence before the court supports the finding under s. 39(B)(1)(c) made by the learned judge, namely, that the appellant at the time of arrest was doing an act for the purpose of trafficking in a dangerous drug. It was also clear that the prosecution was not relying on the presumption of trafficking under s. 37(da) of the DDA, and that being so, bearing in mind the principle in *Abdul Karim Pak Kub & Anor v. PP*, it matters not what the amount of drug used by the chemist was. Likewise, it makes no difference whether the cannabis was 'Indian Hemp' as listed in the Schedule or 'cannabis' as defined in s. 2 of DDA.

[2] Whilst it was true that the learned judge had not re-evaluated the evidence after the appellant had elected to remain silent, such failure had not caused any substantial miscarriage of justice in view of the overwhelming evidence against the appellant. In the circumstances, this court would invoke the proviso to s. 60 of the Courts of Judicature Act 1964 and uphold the finding of the learned judge.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah disabitkan dengan kesalahan di bawah s. 39(B)(1)(c) Akta Dadah Berbahaya 1952 ('ADB') kerana melakukan suatu perbuatan dengan tujuan untuk mengedar 99.6 gram cannabis dan telah dijatuhkan hukuman mati. Sabitan pada asasnya adalah didasarkan kepada keterangan bahawa perayu, ekoran dari suatu rundingan terdahulu bagi menjual dadah berkenaan kepada agen-agen provokatur SP4 dan SP5, telah, pada hari material, membawa dadah tersebut dalam satu beg kuning bertujuan diserahkan kepada SP4 dan SP5. Dalam rayuannya terhadap sabitan dan hukuman, perayu berhujah, pertama, bahawa ahli kimia, dengan hanya mengambil 1 gram bahan ganja tersebut untuk ujian, telah mengambil contoh yang tidak mencukupi bagi analisanya; kedua, bahawa keterangan ahli kimia tidak membuktikan diluar keraguan munasabah bahawa sebahagian besar dari gulungan-gulungan kering tersebut adalah cannabis sepertimana yang ditakrif oleh s. 2 ADB; dan ketiga, bahawa kegagalan hakim bijaksana untuk menilai semula keterangan apabila perayu memilih untuk berdiam diri setelah dipanggil untuk membela diri adalah memudaratkan, mengambilkira bahawa kes ini mendahului *Arulpragasan Sandaraju v. PP* dan adalah dengan itu tertakluk kepada prinsip *Khoo Hi Chiang & Anor v. PP*

and Another Case. Isu utama yang berbangkit adalah sama ada hujahan-hujahan perayu di sini mempunyai merit, memandangkan bahawa pendakwa tidak bergantung kepada s. 37(da) ADB untuk membuktikan kesnya, dan bahawa hakim bijaksana, bilamana memanggil pembelaan, telah berpuas hati bahawa keterangan yang dikemukakan, jika tidak disangkal, akan membawa kepada sabitan.

Diputuskan:
Oleh Arifin Zakaria HMR

[1] Keterangan di hadapan mahkamah menyokong dapatan yang dibuat hakim bijaksana di bawah s. 39(B)(1)(c), iaitu, bahawa perayu semasa di tangkap sedang melakukan suatu perbuatan dengan tujuan untuk mengedar dadah berbahaya. Juga jelas bahawa pendakwaan tidak bergantung kepada andaian pengedaran di bawah s. 37(da) ADB, dan oleh yang demikian, mengambilkira prinsip dalam *Abdul Karim Pak Kub & Anor v. PP*, soal berapa banyak dadah yang digunakan oleh ahli kimia adalah tidak penting. Begitu juga, ianya tidak menjadi hal sama ada cannabis di sini merupakan "Indian Hemp' yang disenarai di dalam Jadual ataupun 'cannabis' seperti yang ditakrif oleh s. 2 ADB.

[2] Sementara ianya memang benar bahawa hakim bijaksana tidak menimbang semula keterangan-keterangan yang ada selepas perayu memilih untuk berdiam diri, kegagalan tersebut tidak sedikitpun menimbulkan salah laksana keadilan memandangkan terdapat keterangan yang mencukupi terhadap perayu. Oleh yang demikian, mahkamah akan menggunapakai s. 60 Akta Mahkamah-Mahkamah Keadilan 1964 dan mengesahkan dapatan hakim bijaksana.

Rayuan ditolak.]

Case(s) referred to:
Abdul Karim Pak Kub & Anor v. PP [1997] 2 CLJ 383 CA ***(foll)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Khoo Hi Chiang & Anor v. PP and Another Case [1994] 2 CLJ 151 SC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
PP v. Alex Hamzah [1995] 3 CLJ 102 HC ***(not foll)***
PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 ***(not foll)***
PP v. Mohammad Ambunani [1995] 3 CLJ 102 ***(refd)***
PP v. Alex Hamzani [1995] 3 CLJ 102 ***(refd)***
Roslin Harun v. PP [1994] 2 MLJ 132 ***(refd)***
Shukri v. Mohamad v. PP [1995] 3 CLJ 799 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 2, 12(2), 39(1)(c), 39B(1)(a), (c), (2)

For the appellant - Karpal Singh Ram Singh; M/s Karpal Singh & Co
For the respondent - Nurul Huda Nuraini Mohd Noor

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-31-92]

Reported by WA Sharif

JUDGMENT

Arifin Zakaria JCA:

Background Facts

The appellant was charged for an offence of doing an act for the purpose of trafficking in dangerous drug to wit cannabis weighing 99.6 gram which is an offence under s. 39B(1)(c) of the Dangerous Drugs Act 1952 ("the Act") punishable under s. 39B(2). The appellant was found guilty by the High Court and sentenced to the mandatory sentence of death. He now appeals to this court against both the conviction and sentence. Having heard the submissions of both learned counsel for the appellant and the learned deputy and after having deliberated over the matter we came to a unanimous decision that the appeal is without merit and accordingly we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court. We now give our reasons.

The facts leading to the arrest of the appellant are briefly as follows. On 8 May 1992, acting on information, two detective constables namely Tahat bin Gasmare (SP4) and Zainul Sabirin bin Abd. Ghani (SP5) from the Cawangan Anti Dadah, Ibu Pejabat Polis Kontinjen Selangor together with an informer proceeded to the river bank at Kampong Sentosa, 6 1/2 mile stone, Jalan Kelang Lama, Petaling Jaya. There the two detective constables were introduced to the appellant who is known as "banana". After negotiation the appellant agreed to sell to the two detective constables 500 rolls of cannabis at the agreed price of RM1.80 per roll. The appellant then told SP4 and SP5 that he will deliver the same on the following day ie, 9 May 1992 at about 8.30pm at the same place.

SP4 and SP5 then informed his superior, Chief Inspector Abdul Rahman bin Mansol about the proposed transaction. A plan to arrest the appellant was then conceived. On the day and time in question SP4 and SP5 proceeded to the place as agreed in a car bearing No. JBP 2265 driven by SP5. At about 8.40pm the appellant and another Malay man appeared on the scene. The appellant was seen carrying a yellow plastic bag (P5). He approached SP5 who was

seated on the driver's side of the car. He then told SP5 that he had the merchandise in question and SP5 asked him whether it was correctly counted and the appellant replied saying that it can be recounted. SP5 then directed the appellant to go to the rear of the car to do the counting. In the mean time SP4 gave the agreed signal to the other members of the ambush party. Detective constable Jumiat bin Mohamad Yunnus (SP3) and constable Haris Fadillah, who were in hiding, then approached the appellant. When SP3 identified himself as a police officer to the appellant, he tried to run, but he was arrested by SP3 and constable Haris. The other Malay man who was with the appellant however, managed to escape. SP3 then took possession of the yellow plastic bag from the appellant, which upon inspection was found to contain 487 rolls suspected to be cannabis. The 487 rolls were then sent to the chemist (SP1) for analysis. SP1 confirmed that the 487 rolls contain 99.6 grams "cannabis" as defined in the Act.

At the close of prosecution's case the learned judge came to a finding that the prosecution had succeeded in establishing a *prima facie* case against the appellant as charged which if unrebutted would warrant a conviction. The appellant was then called upon to enter his defence. The appellant elected to remain silent. A finding of guilty was then entered and the appellant was convicted and sentenced to the mandatory sentence of death.

The Grounds Of Appeal Canvassed Before Us

At the hearing before us Mr. Karpal Singh, learned counsel for the appellant, attacked the finding of the learned judge on three principal grounds. We shall deal with each of these grounds in the order they were raised before us.

The First Ground

Firstly it was contended that the learned trial judge was wrong in accepting the evidence of the chemist on the ground that the chemist failed to take sufficient samples of the drug for analysis. In his evidence the chemist stated that he took 10 random samples to carry out the Duquenois Levin test ("D.L.T.") and the thin layer chromatography ("T.L.C.") analysis. From the test and analysis he concluded that the resin found in the plant material contained the active ingredient of cannabis. In cross-examination he stated that he took about 1 gram of the plant material for D.L.T. and for this test he took 10 samples. It is, however, not clear from his evidence what was the total weight of the plant material used for the D.L.T. As for the T.L.C. analysis he stated that he only carried out the analysis once and of the 10 samples he only took 0.1 gram each. Based on the evidence of the chemist summarised above the learned counsel for the appellant contended that the amount of samples used by the chemist for the chemical test and analysis is inadequate

if one were to use the yardstick as laid down by the Supreme Court in *Leong Bon Huat v. PP* [1993] 3 CLJ 603. In that case the accused was charged for trafficking in cannabis weighing 793.85 grams. The government chemist gave evidence that out of the 793.85 grams the samples he took for analysis was 'more than 10% of the net weight of 793.85g' of the plant material. The main ground of appeal in that case was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s. 2 of the Act. Edgar Joseph Jr. SCJ delivering judgment of the court at pp. 605-606 observed as follows:

> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

The learned counsel further cited the following cases namely – *PP v. Alex bin Hamzani* [1995] 3 CLJ 102; and *PP v. Saad bin Mat Takraw & Anor* [1998] 3 CLJ 380 where the issue of inadequacy of the samples was successfully raised by the defence to rebut the charge of trafficking under s. 39B(1)(a) of the Act. In *PP v. Saad bin Mat Takraw & Anor (supra)* Vincent Ng J at p. 402 stated thus:

> With respect, I would readily adopt and agree with the views expressed by Ian Chin J in *PP v. Mohammad bin Ambunani* [1994] 4 CLJ 871 and Tee Ah Sing JC (as he then was) in *PP v. Alex bin Hamzani* [1995] 3 CLJ 102 that not less than 200 g of plant material has to be chemically tested in order to prove beyond reasonable doubt that the weight conveyed or possessed of was 200 or more grams of cannabis as defined. It would appear that both decisions were guided by the ratio in Leong Bon Huat which, I must add, has not, in any material respect, been overruled by the decision in *Roslim bin Harun v. PP* [1994] 2 CLJ 486. Surely, in my opinion, in a capital charge involving a man's life, and hence essentially subject to strict curial scrutiny, it is not too much to require that the chemist carry out chemical tests on not less than the statutory minimum amount required to trigger the presumption

> under s. 37(da), so as to prove beyond reasonable doubt quantitative breach of such statutory minimum. It would follow that only such minimum amount chemically tested could constitute the expression 'adequate quantity' used in Leong Bon Huat. With such huge amount of plant material seized in the present case, I fail to understand why, in a charge of this nature, the chemist did not conduct the chemical test on at least 200g of the plant material, which would have been the best evidence adducible; notwithstanding that s. 37(j) does not refer to the 'ten per centum' (10%) by weight or quantity of the substance, but rather, by the number of receptacles holding the substance.

Based on the above cited authorities learned counsel contended that the weight of the samples taken in the present case is a far cry from the amount that the courts in the above cited cases have regarded as being adequate.

However, learned counsel quite frankly conceded that there is the case of *Abdul Karim bin Pak Kub & Anor v. PP* [1997] 2 CLJ 383, a decision of this court, which goes against the appellant. In that case the appellants were convicted under s. 39B(1)(a) of the Act by the High Court for trafficking in cannabis and sentenced to death. Before the Court of Appeal, it was argued that there was doubt as to what the substance analysed by the chemist because the chemist merely testified that he found the substance to be cannabis as defined under the Act. It was submitted that in the circumstances the cannabis referred to by the chemist could well be cannabis (Indian Hemp) as listed in Part III of the First Schedule to the Act. Relying on the decision of the Federal Court in *Shukri bin Mohamad v. PP* [1995] 3 CLJ 799 it was urged upon the court to substitute the conviction for that under s. 12(2) of the Act. The Court of Appeal rejected the appellants' argument and dismissed their appeal against both conviction and sentence.

In rejecting the appeal Shaik Daud JCA delivering judgment of the court stated at p. 390 as follows:

> It has not been challenged that the prosecution had adduced evidence of the agent provocateur, admissible under s. 40A of the Act, of the meeting with the appellants, the negotiations for the sale and purchase of the drug, and finally the actual purchase thereof. All this evidence, without doubt, establish the act of trafficking. Trafficking is defined under the Act to include buying, selling, giving, receiving, transporting, carrying, sending, delivering, etc. and once that proved, there is no necessity to invoke the aid of the presumption under s. 37(da) of the Act. It cannot be denied that the presumption would only be invoked when there is no evidence whatsoever of actual trafficking, and when the prosecution is solely relying on the evidence of possession, custody or control. In the light of the definition of trafficking under the Act, it would appear that in theory, where there is evidence of actual trafficking,

even in one gramme of any dangerous drug, whether defined in s. 2 or as listed in the Schedules, it is trafficking under s. 39B(1) of the Act. Of course, in practice, it would not be conscionable to charge anyone with trafficking in one gramme of dangerous drug even when there is evidence of actual trafficking. Therefore, on the facts of the present case and in the light of the overwhelming evidence of actual trafficking of the dangerous drug, even though it may well be cannabis (Indian Hemp), the appellants were rightly convicted of trafficking. If the appellants were found to be merely in possession, custody or control of the 3,503 gms of the drug which, if it turns out to be cannabis (Indian Hemp), then it follows that the presumption under s. 37(da) cannot be invoked against them. This is also recognized by the Federal Court in *Shukri*'s case. Even if the construction most favorable to the appellants is taken as to the type of drug in this case, ie, cannabis (Indian Hemp), in the light of the uncontroverted evidence of actual trafficking, it is our view that they were rightly convicted under s. 39B(1)(a) of the Act.

In the present case the appellant was charged with doing an act for the purpose of trafficking in cannabis weighing 99.6 grams an offence under s. 39B(1)(c) of the Act. At the very inception it is clear that the prosecution was not relying on the presumption of trafficking under s. 37(da). At the close of the prosecution's case the learned judge came to a finding that the prosecution had made out a *prima facie* case against the appellant as charged having regard to the fact that the appellant was the one who negotiated with SP4 and SP5 for the sale of the cannabis to the them. And on the 9 May 1997 the appellant was carrying the yellow plastic beg containing the cannabis when he was arrested by the police. The learned judge held that all these conducts of the appellant point to the fact, as alleged by the prosecution, that the appellant at the time of arrest was doing an act for the purpose trafficking in dangerous drug, an offence under s. 39B(1)(c). We are of the view that the evidence before the court supports the finding made by the learned judge. Since the charge against the appellant is one 15 under s. 39B(1)(c) it matters not what the amount of drug was. (See *Abdul Karim bin Pak Kub*).

We are conscious of the fact that the appellants in *Abdul Karim bin Pak Kub* were charged with an offence under s. 39(1)(a) while the appellant in the present case was charged under s. 39(1)(c) of the Act. We are, however, of the view that the same principal ought to apply to both offences under s. 39(1)(a) and 39(1)(c) of the Act. On that premise the reasoning advanced by this court in *Abdul Karim bin Pak Kub* ought with equal force apply to the present case. For the above reasons we dismissed the first ground raised by the learned counsel in support of this appeal.

The Second Ground

The second ground advanced by learned counsel for the appellant in support of this appeal is that from the evidence of the chemist there is doubt whether the "cannabis" here is "cannabis" as defined in s. 2 of the Act or "Indian Hemp" as listed in Part III of the First Schedule. He submitted that from the testimony of the chemist it would appear that the chemist could not make up his mind on this. In the circumstances he submitted the court ought to have given the benefit of the doubt in favour of the appellant and amend the charge accordingly. In reply the learned deputy argued that whether the "cannabis" here is "Indian Hemp" or "cannabis" as defined in s. 2 is of no consequence as the appellant here was charged under s. 39B(1)(c). The prosecution is not relying on the presumption of trafficking under s. 37(da). It is our view that this same issue had been canvassed in the case of *Abdul Karim bin Pak Kub.* In that case this court ruled that it makes no difference whether the dangerous drug is as defined in s. 2 or as listed in the schedule when the accused is charge for actual trafficking in dangerous drug as the consequence would be the same. We wholly agree with the said view. For the above reasons we rule that the second ground raised by the appellant herein is also devoid of any merit and without any hesitation we dismissed the same.

The Third Ground

We now turn to the third and final ground raised by the learned counsel for the appellant that is, the failure of the learned trial judge to re-evaluate the evidence adduced by the prosecution after the appellant had elected to remain silent. The learned counsel submitted that this case precedes the case of *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597, therefore, the correct test would be the test as set out in *Khoo Hi Chiang v. PP & Anor* [1994] 2 CLJ 151. In the latter case Edgar Joseph Jr. SCJ stated that at the close of the case for prosecution this court is to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether nor not the prosecution's case is not inherently incredible, ie, the *Haw Tua Tau* test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt. In this case the learned trial judge, having evaluated the evidence for the prosecution, at the close of the prosecution case, made the following finding:

> Oleh itu saya berpuashati, setelah memberi penilaian maksima kepada keterangan pendakwaan dalam kes ini seperti yang diputuskan dalam kes *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 bahawa pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap Tertuduh yang, jika tidak disangkal, akan membawa kepada sabitan ke atasnya di atas sebab-sebab seperti yang telah diberikan tadi.

Considering the finding of the learned judge above we are of the view that he had applied the correct test as propounded by the Supreme Court in *Khoo Hi Chiang*. Even though the learned judge initially speaks of a "*prima facie"* case it is further qualified by the statement that "Jika tidak disangkal, akan membawa sabitan ke atasnya ...", which literally translated mean "if unrebutted would warrant a conviction."

It is no doubt true that the learned judge did not, after the appellant had elected to remain silent, go on to reevaluate the evidence adduced by the prosecution. The note of proceedings shows that upon the appellant electing to remain silent the learned judge proceeded to make a finding of guilt against the appellant and convicted and sentence him accordingly. However, having considered the matter we are of the view that no substantial miscarriage of justice had occurred in this case in view of the overwhelming evidence against the appellant. In the circumstances, we invoked the proviso to s. 60 of the Courts of Judicature Act 1964 and uphold the finding of the learned judge.

For the above reasons we would reject the third and final ground of appeal as put forth by the learned counsel for the appellant.

Conclusion

In the result we hold that the learned judge had come to a right decision and for the reasons given above, the appeal by the appellant both against conviction and sentence are hereby dismissed.